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NO. 84-1649

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

Garland Independent School District, et al.

Petitioners

v.

Sterling Wilks, et al.

Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the potential relief available under the Education of the Handicapped Act includes reimbursement to parents for private school tuition and related expenses.

2. Whether a unilateral action by a parent in securing special education and related services bars a claim for reimbursement.

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Sterling Wilks and Victoria Wilks, respectfully request that the Court deny the petition for writ of certiorari filed by Garland Independent School District seeking review of the Fifth Circuit's judgment in this case. The opinion upon which that judgment is based is unreported, but is reprinted in full in Petitioner's Brief at

pages B-1 through B-3 of their Appendix. The denial of Garland's Petition for Rehearing and Rehearing En Banc is reprinted at C-1 and the Judgment is reprinted at D-1.

STATEMENT OF THE CASE

Sterling Wilks is a twelve (12) year old severely autistic youth. This handicap significantly interferes with his ability to benefit from education because of a severe inability to generalize learning, a severe inability to communicate, and severe self-stimulating, self-abusive, aggressive, disruptive and bizarre behavior.

Sterling was in the jurisdiction of Garland Independent School District from May 1978 when Mrs. Victoria Wilks moved there until August 1983 when she moved away. Sterling was initially served, at private expense, as a day student at a nearby Autistic Treatment Center. In early 1979 he was enrolled in the Garland I.S.D. program and his skills began to deteriorate.

Garland I.S.D. offered no program during the summer and by Fall 1979 Sterling was so unmanageable that Mrs. Wilks placed him again as a day student at the Autistic Treatment Center. By November, Sterling had to become

a full-time residential student. For financial reasons Mrs. Wilks had to cut Sterling's program back to a day student in May 1980. By Fall of 1980, Sterling had improved to the point Mrs. Wilks re-enrolled him in the Garland I.S.D. program. Sterling regressed to the point that he had to be hospitalized for seven weeks at private expense in early 1981. Mrs. Wilks returned Sterling to the Garland I.S.D. program but, again, Garland I.S.D. offered no program during the summer months.

During the Summer of 1981, Sterling again regressed severely and Mrs. Wilks paid for a five-day evaluation. In the Fall of 1981 an Individualized Educational Program (IEP) meeting was convened. At that IEP meeting Garland I.S.D. categorically refused to consider any services beyond six hours per day, five days per week and one hundred eighty days' per year. Under no circumstances would they consider residential placement. Garland I.S.D. personnel rejected Mrs. Wilks' independent evaluation.

Mrs. Wilks asked for an impartial due process hearing which was held in November 1981 with judgment for Wilks rendered in February 1982. The hearing officer found the Garland I.S.D. program inadequate to confer educational benefit and ordered a residential placement.

Garland I.S.D. appealed into court and asked the court to terminate Mrs. Wilks' parental rights on the grounds that her request for services beyond six hours per day, five days per week meant she wanted to neglect her parental duties.

Sterling continued in the Garland I.S.D. program. In 1982 Mrs. Wilks hired, at private expense, an expert in autism education who had worked successfully with Sterling when he was at the Autistic Treatment Center. The expert worked after school, on weekends, and during the summer of 1982 when Garland I.S.D. again refused any services.

Garland I.S.D. then hired Mrs. Wilks' expert to work with Sterling during the day in the 1982-83 school year. He would work at Garland I.S.D. expense until the school bell rang and then would continue to work with Sterling at Mrs. Wilks' expense. During the year that expert left the area to become director of a residential autism treatment center in Houston. After that point, Sterling began regressing. In the summer of 1983 Garland I.S.D. once again refused to offer any summer services. In August 1983 Mrs. Wilks moved into the jurisdiction of another school

district which evaluated Sterling and placed him in a residential facility.

The District Court, without any factual hearing, then dismissed the case as moot. The Court of Appeals for the Fifth Circuit vacated and remanded the case for development of the factual record.

ARGUMENT

I. THE ISSUES IN THIS CASE HAVE ALREADY BEEN DECIDED BY THIS COURT IN SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON.

This case involves a parent, driven to seek private services at private expense, to supplement a rigid and inadequate public school program for her child. The parent seeks reimbursement.

A. Petitioner's questions have been answered by Burlington.

Petitioner's first question is whether such reimbursement is available. This Court has already answered unequivocally that it is. In School Committee of

the Town of Burlington, Massachusetts v. Dept. of Education of Massachusetts, 53 U.S.L.W. 4509 (U.S. April 29, 1985) (hereinafter Burlington) this Court unanimously stated:

> The first question on which we granted certiorari requires us to decide whether this grant of authority includes the power to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act. We conclude that the Act authorizes such reimbursement.

slip op. at 9.

Petitioner's second question is whether the action by the parent, in procuring services not agreed to by the school district, bars a claim for reimbursement. This Court has answered unequivocally that it does not.

> We do not agree with the Town that a parental violation of Sec. 1415(e)(3) constitutes a waiver of reimbursement. The provision says nothing about financial responsibility, waiver, or parental right to reimbursement at the conclusion of judicial proceedings. Moreover, if the provision is interpreted to cut off parental rights to reimbursement, the principal purpose of the Act will in many cases be defeated in the same way as if reimbursement was never available.

slip op. at 12.

Not only does 1415(e)(3) not bar a claim for reimbursement; 1415(e)(3) is really inapplicable here because Wilks never changed the placement during the pendency of the proceedings.

Petitioners raise two other issues which are also decided by Burlington. Petitioners argue that damages are not an appropriate remedy, but this Court answered clearly in Burlington that reimbursement is simply not damages, slip op. at 11. Petitioners further argue that Sterling did not meet the exceptional test of imminent physical harm adopted by several Circuits and alluded to in the Fifth Circuit's remand of the instant case. It is clear after Burlington that the rule of no reimbursement, which created the need for such exceptions as imminent physical harm, is now overturned and thus no attention need be paid to such exceptions.

B. The types of expenses sought by Wilks are covered by Burlington.

The expenses for which Wilks seeks reimbursement are all contemplated in the language of the Burlington decision: "private school tuition and related expenses," slip op. at 7; "their expenditures on private special education,"

slip op. at 9; and "expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." Slip op. at 11.

Petitioner Garland L.S.D. intentionally characterizes the expenses incurred by Mrs. Wilks to supplement their inadequate program as "employment of an individual to stay with her son at home after school" (Petitioner's Brief at 3); "after school help" id. (at 13); "child care help at home" id. (at 16); and suggests the expenses were incurred "more for the parent's benefit than for the benefit of their handicapped child." Id. (at 17).

The facts developed at the impartial hearing showed that Garland L.S.D. had no one who could help Sterling and he constantly regressed in their "program." Mrs. Wilks had seen an expert at work with Sterling in his private placement and she cared enough to hire him to help her son. Garland L.S.D. eventually recognized that their program was a monumental failure and hired to run their program the very person they now characterize as Mrs. Wilks' "after school help." Id. (at 13).

The types of special educational services he provided are clearly contemplated by Burlington. Garland L.S.D. still does not understand that fact because they have never

understood that programs are to be "personalized," "tailored" and "specially designed" to meet the "unique needs" of a child. Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176 (1982). They do not agree with the Fifth Circuit ruling that "categorical limitations on the possible duration of special education programs are simply inconsistent with the Act's insistence on IEPs formulated to meet the unique needs of each handicapped child." Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983). Garland I.S.D. categorically refuses to consider any service more than six hours per day, five days per week, ten months per year. Anything beyond that is "after school help" which they refuse to contemplate. Garland I.S.D. has, as a matter of policy, never contracted for a residential placement or provided summer services.

Services that run longer than a six hour day are clearly contemplated by the Education of the Handicapped Act. Kruelle v. New Castle County School District, 642 F.2d 687 (3rd Cir. 1981). Residential services are clearly contemplated, where appropriate. Adams Central School District v. Deist, 334 N.W. 2d 775 (Sup. Ct. Neb. 1983), cert. denied, 104 S.Ct. 239 (1983). Summer services are clearly contemplated by the Act. Georgia A.R.C. v.

McDaniel, 740 F.2d 902 (11th Cir. 1984), cert. denied, 53 U.S.L.W. 3599 (Feb. 19, 1985).

C. The IEP violations to be raised by Wilks are covered by existing law.

Garland I.S.D. assures that no IEP will ever request more than what they choose to provide because they rig the IEP process. They do not give written notice to the parents as required by the Act. They refuse to consider independent evaluations. And prior to the meeting they tell the school employees what position to take. See Affidavit of Sharla Hovey, Record at 429-432.

Garland I.S.D. prejudices the IEP process because they do not want an open and fair analysis of a child's needs which might call for services beyond their predetermined limits. Garland I.S.D. does not use the standard enunciated in Rowley, supra: whether the IEP is reasonably calculated to enable the child to receive educational benefits. Their standard is whether the IEP is reasonably calculated to fit within their budget.

The final cynical weapon that they use to discourage parental assertiveness is to petition for termination of parental rights if a parent asks for more than what Garland

I.S.D. personnel, meeting in private, have determined to be the maximum program that they will allow.

This Court reaffirmed in Burlington that "In several places, the Act emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness," slip op. at 8, and further that "Congress incorporated an elaborate set of what it labeled procedural safeguards to insure the full participation of the parents ..." including notice and an independent evaluation. Slip op. at 9.

Issues which Wilks will raise at the District Court level about Garland I.S.D.'s illegalities are all well covered by existing decisions of this Court on the Education of the Handicapped Act. See Rowley, supra; Irving Independent School District v. Tatro, 104 S.Ct. 3371 (1984) and Smith v. Robinson, 104 S.Ct. 3457 (1984).

II. THE DECISION OF THE COURT OF APPEALS WAS CORRECT.

This case needs to go back to District Court for a determination of what evidence is needed, in addition to the Hearing Officer record, for a full determination of the

facts. Wilks wants an opportunity to show Garland I.S.D.'s hopelessly inadequate programming; their callous disregard for the education and well-being of a child; their intentional procedural violations that deny any parental input and make a hoax out of the IEP process; and their policy of seeking to terminate the parental rights of a parent who challenges them.

This case cannot be resolved before that is done and the Circuit Court was correct in remanding this case to develop the factual record.

The proper standard, in light of Burlington, would be first to determine if the school district program was appropriate (looking both to whether the Act's procedural requirements were followed and whether the resulting IEP was reasonably calculated to confer educational benefit on the child) and, second, if not, whether the expenses incurred by the parent would have been borne by the district had it developed a proper IEP. Full development of the facts is therefore needed. The decision of the Fifth Circuit is wholly consistent with the law as enunciated in Burlington.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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